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No. 93-1094

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CITY OF CHICAGO,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY and
JEROME B. GRUBART, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

In holding that this was not an admiralty case, the district court relied on the four-part test first articulated in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974). Pet. App. 32a. The court of appeals, however, expressly rejected the *Kelly* test; held that the courts "may not engage in [that] sort of . . . analysis"; and announced instead a "more rigidly structured" test. Pet. App. 7a. In its brief in this Court, respondent Great Lakes Dredge & Dock Co. ("Great Lakes") now argues that there is no significant difference between the test the court of appeals employed and the

Kelly test utilized by the district court; rather, Great Lakes contends that these tests are substantially the same. Br. 13-15. On this point, we agree with the court of appeals—there is a critical difference between the test it used and the *Kelly* test. The court of appeals expressly refused to consider whether there is a need for a uniform federal rule of decision governing this type of tort claim, see Pet. App. 7a, an inquiry in which the district court had engaged, see Pet. App. 32a-33a, 37a-38a, and which is a critical part of the *Kelly* test. Thus Great Lakes' efforts to paper over the difference between the law in those circuits that employ the *Kelly* test and the rule announced by the court below should be rejected.

Great Lakes also argues that the court of appeals correctly applied this Court's decision in *Sisson v. Ruby*, 497 U.S. 358 (1990). But Great Lakes' submission on this point misreads *Sisson*. By analyzing this case as if the only relevant issue were whether Great Lakes' pile driving activities proximately caused the plaintiffs' injuries, Great Lakes collapses the appropriate jurisdictional inquiry into the merits in a manner forbidden by *Sisson*, while ignoring the implications of extending federal admiralty jurisdiction throughout Chicago's Loop.

1. Great Lakes argues that there is no conflict between the five circuits that adhere to the *Kelly* test after *Sisson* (see Pet. 8-9) and the Seventh Circuit "because the *Kelly* test is simply an articulation of the factors that may be, but after *Sisson* are not always, part of the general characteristics of the relevant activity." Br. 13. Plainly the Seventh Circuit itself does not share this view; it rejected the district court's use of the *Kelly* test precisely because it believed that such a "policy analysis" was inappropriate. Pet. App. 7a.

The court of appeals criticized the district court for considering in its jurisdictional analysis whether the "case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such

as those involving navigation and seaworthiness." Pet. App. 7a. The *Kelly* test, in contrast, permits this inquiry under its fourth prong—consideration of traditional concepts of the role of admiralty law. The circuits that have adhered to *Kelly* since *Sisson* have included consideration of this very issue in their jurisdictional analysis. *E.g.*, *Whitcombe v. Stevedoring Services of America*, 2 F.3d 312, 315 (9th Cir. 1993) (considering whether the case presented a need for "traditional maritime principles of providing uniformity in the law and an adequate remedy for the injured party"); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991) (considering whether the case presented the need for "a uniform body of law to provide a remedy for those injured while traveling on navigable waters"); *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533, 1539 (11th Cir. 1991) (considering whether the case presented "the need for a uniform development of laws governing maritime industries"), cert. denied, 112 S. Ct. 881 (1992); *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 440 (5th Cir. 1991) (considering whether the case implicated the "federal interest in the need for a uniform development of the law"). See also *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 886 (5th Cir. 1993) (finding admiralty jurisdiction because the plaintiff was injured on a ship and "[o]ne of the traditional roles of admiralty law is to provide compensation for injuries aboard ship"); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1263 (9th Cir. 1993) (no need to use admiralty law to protect houseboat guest injured while diving off boat); *Penton v. Pompano Construction Co.*, 976 F.2d 636, 641-42 (11th Cir. 1992) (finding no admiralty jurisdiction because injury was caused by operation of equipment ordinarily used on land and hence appropriately judged by state-law standards); *Price v. Price*, 929 F.2d 131, 135-36 (4th Cir. 1991) (finding admiralty jurisdiction because plaintiff's injuries resulted from errors in navigation that implicate traditional maritime concerns);

Broughton Offshore Drilling, Inc. v. South Central Machine, Inc., 911 F.2d 1050, 1053 (5th Cir. 1990) (finding admiralty jurisdiction because the tort caused damage to a vessel, which is "the primary concern of admiralty law").

Although we urged Great Lakes to explain why its activities need to be governed by uniform federal rules of decision, see Pet. 10, Great Lakes never does so. Under the *Kelly* test, of course, Great Lakes would be forced to address this point. What is more, under the *Kelly* test, Great Lakes could not hope to prevail. Pile driving is an inherently localized activity performed from a stationary platform; the contractor can easily identify the state-law rules that will control if it causes land-based injuries to others, and can protect against those risks through appropriate contractual or insurance arrangements. Those actually moving in maritime commerce—such as ships that might hit a negligently placed piling or whose passage is delayed by the negligence of the contractor—surely do need the protection of uniform federal rules, but a pile-driving contractor needs no such protection against land-based claims such as those at issue here. As the district court concluded after applying the *Kelly* test:

> In summary, the relevant facts alleged to be present in this now historic calamity to our city do not involve traditional maritime concerns. Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. There is no compelling reason to adjudicate the host of issues raised by the pleadings under this specialized set of rules. Traditional common law rules of tort and contract should do quite nicely here; the specialization of admiralty rules is not necessary. The totality of circumstances lead[s] unyielding to that conclusion. Simply put, we have land-based

> injuries caused by land-based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform. The maritime connection of the principal activities is neither direct nor material and suppl[ies] none of the causation for the alleged injuries. There are no traditional maritime concerns present here and, without [them], no admirality jurisdiction.

Pet. App. 37a-38a. The court of appeals reached a different result only because it rejected the *Kelly* test in favor of its "more rigidly structured" approach. Thus the difference in tests employed was central to the resolution of this case.

Great Lakes argues that the question what test should govern cases such as this was resolved in *Sisson* itself. Br. 9. The *Sisson* opinion belies that contention. In *Sisson*, the Court concluded that "at least in cases in which all of the relevant entities are engaged in similar types of activity (cf. n.3, *supra*)," its two-part inquiry provided "appropriate and sufficient guidance to the federal courts." 497 U.S. at 366 n.4. In footnote 3, the Court acknowledged that "[d]ifferent issues may be raised by a case in which one of the instrumentalities is engaged in a traditional maritime activity but the other is not. Our resolution of such issues awaits a case that squarely raises them." *Id.* at 365 n.3. Four circuits have concluded, contrary to Great Lakes' belief, that *Sisson* reserved—and did not decide—the question whether the *Kelly* test should be used in a case where some of the relevant entities were not engaged in traditional maritime activities. See *Coats*, 5 F.3d at 885; *Delta Country Ventures*, 986 F.2d at 1263; *Eagle-Picher Industries, Inc. v. United States*, 937 F.2d 625, 633 n.7 (D.C. Cir. 1991); *Sinclair*, 935 F.2d at 602; *Broughton Offshore Drilling*, 911 F.2d at 1052 & n.1.[1]

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[1] As we explained in the petition, see Pet. 9 n.4, the only respect in which *Sisson* modified the *Kelly* test is that it removed from the

This case squarely presents the question reserved in *Sisson*—what test should be used when not all the relevant entities are engaged in maritime commerce? Here, the plaintiffs own or work at businesses in the Loop; no one contends that they are engaged in traditional maritime activities. And most of the City's activities relevant to the case—its operation and maintenance of an underground tunnel—are not maritime activities either. When all parties are engaged in maritime activities, the nexus to maritime concerns is quite clear, and the "more rigidly structured" analysis utilized by the Seventh Circuit may be appropriate. But when some of the relevant entities are not engaged in maritime activities, and thus an effort is made to extend the reach of admiralty jurisdiction to land-based injuries, consideration of the policy questions raised by the *Kelly* test is also necessary. Thus the Court should now decide the question it left open in *Sisson*.

2. Great Lakes defends the Seventh Circuit's application of the Admiralty Extension Act, 46 U.S.C. App. § 740, by agreeing with that court that the rule announced in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963), which generally permits the extension of admiralty jurisdiction to land-based injuries only when they are not remote in time or place from activities on navigable waters, merely "deals with proximate causation." Br. 17. On this view, as long as an injury is proximately caused by activity on navigable waters, the Admiralty Extension Act extends federal jurisdiction to that injury.

One needs no more than *Sisson* to identify the flaw in Great Lakes' analysis. There the Court cautioned against collapsing the merits of proximate causation into a federal court's jurisdictional inquiry: "Were courts required to focus more particularly on the causes of the harm,

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third prong of the test consideration of what caused the injury. See *Coats*, 5 F.3d at 886; *Whitcombe*, 2 F.3d at 315; *Delta Country Ventures*, 986 F.2d at 1263.

they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question." 497 U.S. at 365. The wisdom of the Court's admonition is illustrated by the facts of this case. Great Lakes alleged in its admiralty petition that the City's negligent maintenance of the tunnel was the sole cause of the flood, and that Great Lakes' activities had nothing to do with it. If Great Lakes were to prove just that at trial, then, under Great Lakes' reading of *Gutierrez*, presumably the existence of federal jurisdiction over the case would be retroactively destroyed. It is for this reason, among others, that this Court does not permit the merits of proximate causation to be collapsed into the jurisdictional inquiry.

The remoteness rule is thus a jurisdictional limitation on the federal courts. As we point out in our petition, it was erected not merely to guide proximate cause inquiries, but rather to protect the balance of power in our federal system by ensuring that federal admiralty jurisdiction is not extended into areas traditionally governed by state law without sufficient justification. See Pet. 13-15. Yet Great Lakes presents no justification for expanding the reach of federal law as the Seventh Circuit has done. Its sterile reliance on "the *Sisson* test" as an answer to the federalism issues presented here, see Br. 17, reflects both a misunderstanding of *Sisson* and a lack of appreciation of the dangers that flow from undisciplined use of the Admiralty Extension Act to extend *Sisson*'s holding inland.

3. In response to our submission that the court of appeals misapplied *Sisson* by focussing on the underlying cause of the flood rather than on the precise incident and activities that damaged the plaintiffs (the operation and flooding of the tunnel), Great Lakes says only that plaintiffs' complaints against it alleged "that Great Lakes' negligence caused the flood and plaintiffs' consequent harm." Br. 19. This misapprehends the central thrust of our sub-

mission on this point—as we have just explained, *Sisson* rejected inquiry into causation at the jurisdictional stage because causation questions go to the ultimate merits of the case. As to the "incident," for example, it is the flooding of the tunnel, and not the question whose negligence may have proximately caused it, that is the appropriate focus under *Sisson*. And Great Lakes does not deny that if the flood—and not its cause—is the correct place to begin the *Sisson* inquiry, then the result reached by the court of appeals cannot stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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